



UNITED STATES PATENT AND TRADEMARK OFFICE

UNITED STATES DEPARTMENT OF COMMERCE
United States Patent and Trademark Office
Address: COMMISSIONER FOR PATENTS
P.O. Box 1450
Alexandria, Virginia 22313-1450
www.uspto.gov

APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/007,477	11/08/2001	Bret A. Ferree	BAF-10703/29	2845

7590

10/28/2004

John G. Posa
Gifford Krass, Groh et al
Suite 400
280 N. Old Woodward Ave.
Birmingham, MI 48009

EXAMINER

PRIDDY, MICHAEL B

ART UNIT	PAPER NUMBER
----------	--------------

3732

DATE MAILED: 10/28/2004

Please find below and/or attached an Office communication concerning this application or proceeding.

Office Action Summary

Application No.

10/007,477

Applicant(s)

FERREE, BRET A.

Examiner

Michael B Priddy

Art Unit

3732

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If the period for reply specified above is less than thirty (30) days, a reply within the statutory minimum of thirty (30) days will be considered timely.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

- 1) ☒ Responsive to communication(s) filed on 30 July 2004.
- 2a) ☐ This action is **FINAL**. 2b) ☒ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

- 4) ☒ Claim(s) 1-3,5 and 7-117 is/are pending in the application.
- 4a) Of the above claim(s) _____ is/are withdrawn from consideration.
- 5) ☒ Claim(s) 12-17 is/are allowed.
- 6) ☒ Claim(s) 1-3,5 and 7 is/are rejected.
- 7) ☒ Claim(s) 8-11 is/are objected to.
- 8) ☐ Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on _____ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some * c) ☐ None of:
- ☐ Certified copies of the priority documents have been received.
 - ☐ Certified copies of the priority documents have been received in Application No. _____.
 - ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

* See the attached detailed Office action for a list of the certified copies not received.

Attachment(s)

- 1) ☒ Notice of References Cited (PTO-892)
- 2) ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948)
- 3) ☐ Information Disclosure Statement(s) (PTO-1449 or PTO/SB/08)
Paper No(s)/Mail Date _____.
- 4) ☐ Interview Summary (PTO-413)
Paper No(s)/Mail Date. _____.
- 5) ☐ Notice of Informal Patent Application (PTO-152)
- 6) ☐ Other: _____.

DETAILED ACTION

Claim Rejections - 35 USC § 102

The following is a quotation of the appropriate paragraphs of 35 U.S.C. 102 that form the basis for the rejections under this section made in this Office action:

A person shall be entitled to a patent unless –

(e) the invention was described in (1) an application for patent, published under section 122(b), by another filed in the United States before the invention by the applicant for patent or (2) a patent granted on an application for patent by another filed in the United States before the invention by the applicant for patent, except that an international application filed under the treaty defined in section 351(a) shall have the effects for purposes of this subsection of an application filed in the United States only if the international application designated the United States and was published under Article 21(2) of such treaty in the English language.

Claims 1-3, 5, and 7 are rejected under 35 U.S.C. 102(e) as being anticipated by Michelson (U.S. 6,558,423). Michelson teaches an interbody spinal fusion implant for use between an upper vertebral body having an inferior vertebral endplate and a lower vertebral body having a superior endplate, the distance between the endplates defining at least one intervertebral space, the device comprising: a biocompatible fusion device 800 having a height which is greater than the intervertebral spacing such that when implanted, at least a portion of the device 800 penetrates into one or both of the upper lower vertebral bodies; and a threaded fastener 842 configured to extend through the device 800 and the vertebral body into which the fusion device 800 extends; wherein the fusion device 800 includes an aperture 834 adapted to receive the fastener 842; and furthering including a guide 836.

Concerning the method of claim 7, Michelson teaches all of the method steps recited in beginning in on line 45 of column 15—

Art Unit: 3732

removing a section of the upper vertebra, the lower vertebra or both vertebra, including a portion of its respective endplate; (column 15, lines 45-51)

installing the a fusion device 800 between the vertebra so as to substantially consume the removed sections; and (column 16, lines 22-27)

installing a fastener 842 through the fusion device and each vertebra into which the fusion device extends; temporarily installing an alignment guide 880 (to the screw 842); and installing the fastener 842 using the guide 880. (column 17, lines 2-8)

Allowable Subject Matter

Claims 8-11 are objected to as being dependent upon a rejected base claim, but would be allowable if rewritten in independent form including all of the limitations of the base claim and any intervening claims.

Claims 12-17 are allowed.

Response to Arguments

Applicant has argued that the Michelson reference (US 6,558,423) does not teach the step of "installing a fastener into at least one of the vertebra, such that the fastener extends into the fusion device." And further clarifies this by indicating Michelson does not teach "fasteners penetrate through the vertebral body and then into the device." The Examiner contends that since Michelson teaches the fastener 842 passes through both the fusion device 800 and at least one vertebra (as shown in Fig. 51), Michelson teaches all of the limitations of the claim. It should be noted that the

Art Unit: 3732

language of claim 7 does not require a specific order or orientation of the fastener once implanted, only that it must pass through both objects.

The allowability of the subject matter of previously pending claims 4 and 6 which is now incorporated into independent claim 1 has been withdrawn. In a continuing effort to issue valid patents, the Examiner has interpreted the claims in view of Michelson from a different perspective and this has resulted in their rejection. The Examiner sincerely regrets any inconvenience to Applicant or Applicant's representative.

Conclusion

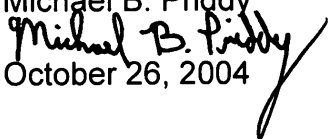
Any inquiry concerning this communication from the examiner should be directed to Michael B. Priddy whose telephone number is (703) 308-8620. The examiner can normally be reached on Mon.-Fri. 8 a.m. - 5 p.m..

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Kevin Shaver can be reached on (703) 308-2582. The fax phone number for the organization where this application or proceeding is assigned is 703-872-9306.

Art Unit: 3732

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free).

Michael B. Priddy


October 26, 2004